IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE AT NASHVILLE

THE TENNESSEAN, ASSOCIATED PRESS, *CHATTANOOGA TIMES FREE PRESS*, *KNOXVILLE NEWS SENTINEL*, TENNESSEE COALITION FOR OPEN GOVERNMENT, INC., ASSOCIATED PRESS BROADCASTERS, WZTV FOX 17, WBIR-TV Channel Ten, WTVF Channel Five, *THE COMMERCIAL APPEAL*, and WSMV-TV Channel Four,	)	
Plaintiffs/Petitioners,	)	
v.	)	No. 14-156-IV
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,	)	
Defendant/Respondent.	)	

RESPONSE OF INTERVENOR-DEFENDANTS DISTRICT ATTORNEY GENERAL JOHNSON AND STATE OF TENNESSEE

Come the Intervening Defendants District Attorney General Victor S. Johnson, III, and the State of Tennessee, by and through the Attorney General and Reporter for the State of Tennessee, and hereby submit this Response to Plaintiffs' Complaint and Petition for Access to Public Records.

INTRODUCTION AND BACKGROUND

In late June 2013, the Police Department of the Metropolitan Government of Nashville and Davidson County ("Metro") was notified by the Vanderbilt University Campus Police about an alleged rape that had occurred on campus on June 23, 2013. Metro Police immediately began an investigation, which resulted in four individuals being indicted in August 2013 on five counts of aggravated rape and two counts of aggravated sexual battery. Additionally, one of the four individuals was also indicted on one count of unlawful photography and one count of tampering with evidence. All four individuals subsequently pled not guilty in Davidson County Criminal Court. On October 2, 2013, Assistant District Attorney General Tom Thurman and counsel for these four individuals agreed to a protective order that was issued by the Davidson County Criminal Court pursuant to Tenn. R. Crim. P. 16(d)(1). This protective order specifically provides that "any and all photographs and videos provided in discovery by the State shall not be disseminated in any manner to any person other than the defense team."

On October 17, 2013, a reporter with *The Tennessean* made a request to the Metro Police Department in which he requested copies of "[a]ny records (as that term is broadly defined in the Act) regarding the alleged rape on the Vanderbilt campus in which Vandenburg, Banks, Batey and McKenzie are charged" and "[a]ny records regarding the case recently concluded against Boyd by his plea bargain."[1] *See* Exhibit A to Petitioners' Complaint. This request specifically requested copies

[1] Another individual, Chris Boyd, pled guilty to a reduced charge of trying to help cover up the alleged rape.

of any "text messages received or sent and videos provided and/or prepared by any third party sources." *Id.*

On October 23, 2013, Metro denied the request based upon the authorities set forth in Exhibit B to Petitioners' Complaint and in particular the provisions of Tenn. R. Crim. P. 16(a)(2). The Tennessean renewed its demand in a letter from their counsel on October 28, 2013. *See* Exhibit C to Complaint. Metro responded on October 31, again denying the request. *The Tennessean* then directed its demand for the records in question to Mayor Karl Dean. *See* Exhibit E to Complaint. Mayor Dean, by letter from the Metro Director of Law, denied the request on November 21, 2013. *See* Exhibit F to Complaint.

The Tennessean took no further action with respect to its public records request until February 4, 2014, when counsel for *The Tennessean* sent a letter to Metro renewing *The Tennessean's* original October 17 request, and adding the rest of the Petitioner news organizations as additional requestors. *See* Exhibit G to Complaint. Metro responded that same day that it was still denying the request and further noted that a protective order had been entered in the ongoing criminal case that covered many of the records requested. *See* Exhibit H to Complaint. Petitioners then filed suit against Metro on February 5, 2014.

The Attorney General, on behalf of District Attorney General Johnson and the State of Tennessee, moved to intervene on February 11, 2014. After a hearing on February 13, 2014, this Court granted the Attorney General's motion to

intervene to protect the interests of District Attorney General Johnson and the State of Tennessee in this proceeding.

ARGUMENT

Tennessee's Public Records Act, in general, provides that

> [a]ll state, county and municipal records shall, at all times during business hours, . . . be open for inspection by any citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, *unless otherwise provided by state law.* (Emphasis added).

Tenn. Code Ann. § 10-7-503(a)(2)(A). A "public record" is defined as all "documents . . . or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency." Tenn. Code Ann. § 10-7-503(a)(1).

Plaintiffs made a public records request to the Metro Police Department for copies of "[a]ny records (as that term is broadly defined in the Act) regarding the alleged rape on the Vanderbilt campus in which Vandenburg, Banks, Batey and McKenzie are charged" and "[a]ny records regarding the case recently concluded against Boyd by his plea bargain." *See* Exhibit A to Plaintiffs' Complaint. Such request specifically included any "text messages received or sent and videos prohibited and/or prepared by any third party sources." *Id.* This request was denied on the grounds that these records are protected from public disclosure while a criminal investigation and prosecution are ongoing under Tenn. R. Crim. P. 16(a)(2). Plaintiffs' now seek judicial review of that decision pursuant to Tenn. Code Ann. § 10-7-505(a). The gravamen of Petitioners' complaint is that Tenn. R.

Crim. P. 16(a)(2) only protects documents or records created by the district attorney general, state agents and law enforcement officers from public inspection, and any evidence that is gathered during the course of a criminal investigation and/or that may be used in a criminal prosecution that was created by a third party is not protected and is subject to inspection under the Public Records Act.

I. All videos and photographs are protected by the protective order issued in the case of *State of Tennessee v. Banks, et al.*, Davidson Criminal Court No. 20013-C-2199 and, therefore, are not subject to inspection under the Public Records Act.

The Tennessee Supreme Court has long recognized that the Rules of Civil and Criminal Procedure are state laws and that documents sealed by a protective order pursuant to either of these rules are not subject to inspection under the Public Records Act. *See Ballard v. Herzke*, 924 S.W.2d 652, 662 (Tenn. 1996); *see also Arnold v. City of Chattanooga*, 19 S.W.3d 779, 785 (Tenn. Ct. App. 1999); *Knoxville News-Sentinel v. Huskey*, 982 S.W.2d 359, 362 (1998). That Court has explained the function of protective orders:

> Protective orders are intended to offer litigants a measure of privacy, while balancing against this privacy interest the public's right to obtain information concerning judicial proceedings. In addition, protective orders are often used by courts as a device to aid the progression of litigation and to facilitate settlements. Protective orders strike a balance, therefore, between public and private concerns.

Ballard, 924 S.W.2d at 658 (citing *Pansy v. Borough v. Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994); *see also In re NHC—Nashville Fire Litigation*, 293 S.W.3d. 547, 562 (Tenn. Ct. App. 2008).

In the pending criminal prosecutions, a protective order prohibiting the disclosure of any video or photographs provided in discovery by the State was entered by the Davidson County Criminal Court on October 2, 2013—over two weeks before *The Tennessean* made its first public records request. To date, District Attorney General Johnson has provided copies of all photographs and videos in his possession to the criminal defendants in discovery. Thus, all videos and photographs in the police investigative file[2] are currently sealed by virtue of the protective order issued by the Davidson County Criminal Court pursuant to Tenn. R. Crim. P. 16(d) and, under the Supreme Court's holding in *Ballard*, are not subject to inspection under the Public Records Act.

Moreover, to the extent that Plaintiffs assert that such protective order was improvidently issued by the Davidson County Criminal Court, or that such protective order should be modified, the Tennessee Supreme Court specifically recognized in *Ballard* that the appropriate procedure to challenge or to seek modification of a protective order is *to intervene in the action in which the protective order was issued. See Ballard*, 924 S.W.2d at 657 ("[W]e agree with those federal and state courts in other jurisdictions which have routinely found that third parties, including media entities, should be allowed to intervene to seek modification of protective orders to obtain access to judicial proceedings or records."); *see also Knoxville News-Sentinel v. Huskey*, 982 S.W.2d at 362 (recognizing that "it is

[2]Everything in the Metro Police investigative file is also contained in the District Attorney General's prosecutorial file. In particular, all of the videos and photographs contained in the investigative file are also in the District Attorney's prosecutorial file. *See* Affidavit of District Attorney General Victor S. Johnson, III, attached hereto as Exhibit 1 and incorporated herein by this reference.

appropriate to allow media entities to intervene in court proceedings wherein the intervenors seek modification of a court order sealing judicial records from public inspection"). This procedure is based on the recognition of a trial court's inherent supervisory authority over its own records and files. *See In re NHC-Nashville Fire Litigation*, 293 S.W.3d at 561 (" 'Every court has supervisory power over its own records and files, and access has been denied where court files might have become vehicles for improper purposes,' such as promoting public scandal or publication of libelous statements.") (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598, 98 S.Ct. 1306, 55 L.ed.2d 570 (1978)).

By not moving to intervene in the pending criminal case to challenge or modify the protective order, but instead by filing this action, Plaintiff is effectively asking this Court to make a decision about the disclosure of evidence in a case that is pending in another court—despite that court's inherent supervisory authority over its own records. However, the trial judge assigned to the pending criminal prosecution clearly is in a far better position to appropriately weigh the competing interests of public access and the defendants' right to a fair trial. *See Chester, et al. v. City of Knoxville*, Knox County Chancery Court No. 164305-3, Memorandum Opinion and Order at 4-5 (November 8, 2006) (copy attached). Accordingly, any request to lift or modify the protective order should be directed to and decided by the court that issued the protective order—the Davidson County Criminal Court.

Thus, to the extent Plaintiff's Petition seeks access to videos and photographs, such records are protected from disclosure under the protective order

issued by the Davidson County Criminal Court pursuant to Tenn. R. Crim. P. 16(d) and Plaintiff's complaint seeking access to these records should be denied.

II. Public disclosure of the records contained in an active criminal case could violate the criminal defendants' constitutional right to a fair trial.

The Sixth Amendment to the United States Constitution, which is applicable to the States through the Fourteenth Amendment, provides a person charged with the commission of a criminal offense with a number of guarantees all of which have as their overriding purpose the protection of the accused from prosecutorial and judicial abuses. Among such guarantees is the "right to a speedy and public trial, by an impartial jury." Art. I, § 9, of the Tennessee Constitution contains similar guarantees to the accused, including the guarantee of a "speedy, public trial, by an impartial jury of the County in which the crime shall have been committed." Thus, the right to a trial by jury is a foundational right protected by both the federal and state constitutions.

The right to a jury trial envisions that all contested factual issues will be decided by jurors who are unbiased and impartial. *Ricketts v. Carter*, 918 S.W.2d 419, 421 (Tenn. 1996). An unbiased and impartial jury is one that begins the trial with an impartial frame of mind, that is influenced *only by the competent evidence admitted during the trial and that bases its verdict on that evidence. Durham v. State*, 188 S.W.2d 555, 558 (Tenn. 1945); *see also State v. Adams*, 405 S.W.3d 641, 650 (Tenn. 2013) ("Jurors must render their verdict based only upon the evidence introduced at trial, weighing the evidence in light of their own experience and

knowledge."); *State v. Claybrook*, 736 S.W.2d 95, 100 (Tenn. 1987) ("In every criminal case the defendant is entitled to have his guilt or innocence determined by impartial and unbiased jurors who have not been subjected to the influence of inadmissible and prejudicial information . . .."); *State v. Shepherd*, 862 S.W.2d 557, 570 (Tenn. Crim. App. 1992) ("Regardless of how heinous the offense or how depraved an accused may be proven to be, our constitutional system of justice demands that the determination of guilt and imposition of sentence arise from a fundamentally fair hearing which includes the right to a fair and impartial jury.").

The United States Supreme Court has long recognized that adverse publicity can endanger the ability of a defendant to receive a fair trial. *Gannett Co., v. DePasquale*, 442 U.S. 368, 378 (1979). Moreover, studies have found that pretrial media coverage does impact jurors' decisions to the detriment of the defendant and arguably, society as a whole. *See* Christina A. Studebaker & Steven D. Penrod, *Pretrial Publicity: The Media, the Law and Common Sense*, 3 Psychol. Pub. Pol'y & L. 428, 433 (1997) (describing studies indicating that pretrial publicity does prejudice juries). It has been observed that "judicial common sense often reflects a misappraisal or misunderstanding by the courts of the capabilities and weaknesses of human inference and decision making. The courts' assumptions and expectations about jurors' decision-making processes and ability to disregard pretrial publicity are not consistent with social science findings concerning these matters." *Id.* at 455; *see also* Amy L. Otto, Steven D. Penrod & Hedy R. Dexter, *The Biasing Impact of Pretrial Publicity on Juror Judgments*, 18 Law & Hum. Behav. 453 (Aug. 1994);

Norbert L. Kerr, *The Effects of Pretrial Publicity on Jurors*, 78 Judicature 120 (Nov.-Dec. 1994); James R. P. Olgoff & Neil Vidmar, *The Impact of Pretrial Publicity on Jurors*, 18 Law & Hum. Behav. 507 (Oct. 1994). In a widely publicized case such as the present criminal case, "the right of the accused to trial by an impartial jury can be seriously threatened by the conduct of the news media prior to and during trial." *Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue*, 45 F.R.D. 391, 394 (1968). Thus, in order to safeguard the due process rights of an accused, a trial court has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity. *Gannett*, 443 U.S. at 378; *U.S. v. Gurney*, 558 F.2d 1202, 1209 (5th Cir. 1977) ("[I]t is the trial judge's primary responsibility to govern judicial proceedings so as to ensure that the accused receives a fair, orderly trial comporting with fundamental due process.").

Here it is undisputed that there has already been significant pretrial publicity concerning the criminal case. *See* Plaintiffs' Complaint at p. 1 ("The incident and the cases have caused intense scrutiny by the Vanderbilt and regional community and have attracted national public attention."). *See also* Affidavit of Becky S. Roberts attached hereto as Exhibit 2 and incorporated herein by this reference. Indeed, the ongoing pretrial publicity has already made it difficult to empanel an unbiased and impartial jury in the criminal case. *See* Johnson Affidavit, Exhibit 1. However, the issues presented in this case raise the significant possibility of making it even more difficult to find an impartial jury.

As previously discussed, the gravamen of Plaintiffs' complaint is that only documents or records created by the district attorney general, state agents and law enforcement officers are not subject to inspection pursuant to Tenn. R. Crim. P. 16(a)(2), and that any evidence obtained or gathered during the course of a criminal investigation created by a third party is not protected and is subject to inspection under the Public Records Act. *See* Plaintiffs' Complaint at ¶ 13 ("Plaintiffs have requested 'materials obtained or gathered but which were recorded or prepared by persons or institutions other than state agents or law enforcement officers . . . be provided. This would include, but not be limited to, text messages received or sent and videos provided and/or prepared by any third-party sources.'"); *see also* ¶ 18 ("*The Tennessean*'s position that it and other requestors are entitled to public records which were not 'made by' law enforcement.") and ¶ 20 ("Metropolitan Government has refused to provide the 'third party records' requested in *The Tennessean* request."). However, these "third party records" constitute the very evidence that may or may not be introduced during the course of the criminal trial. The public disclosure of this evidence before that trial—as Plaintiffs insist is required under the Public Records Act— could violate the criminal defendants' right to a fair trial guaranteed under the federal and state constitutions.

Indeed, a number of courts, including the United States Supreme Court, have recognized that the public disclosure of evidenced presented in court in a pretrial proceeding, such as a hearing on a motion in limine or motion to suppress evidence, can present a serious threat to a defendant's constitutional right to a fair trial

because it can result in the disclosure of evidence inadmissible at trial. *See, e.g., Gannett Co., Inc. v. DePasquale*, 443 U.S. at 378 ("Publicity concerning the proceedings at a pretrial hearing, however, could influence public opinion against a defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial."); *United States v. McVeigh*, 119 F.3d 806, 813 (10th Cir. 1997) (noting that "suppressed evidence, by definition, will not be admissible at trial, and thus press access to such evidence will not play a significant positive role in the functioning of the criminal process, as that evidence is simply irrelevant to the process. On the contrary, disclosure of such evidence would play a negative role in the functioning of the criminal process, by exposing the public generally, as well as potential jurors, to incriminating evidence that the law has determined may not be used to support a conviction"); *In re Gannett News Service, Inc.*, 772 F.2d 113, 115 (5th Cir. 1985) (in declining to lift seal on motions in limine to exclude evidence, the court noted that "[t]he likelihood of potential jurors considering this evidence improperly and the difficulty of selecting an impartial jury given the certain widespread dissemination of this evidence mandates that this particular matter be kept under seal only until such time as they are offered in evidence for use at trial"); *United States v. Chagra*, 701 F.2d 354, 364 (5th Cir. 1983) (noting that evidence may be considered in a bail reduction hearing that would not be admissible at trial and public disclosure of such inadmissible evidence would "present a serious threat to the defendant's fair trial right"); *United States v. Kemp*, 365 F.Supp.2d 618, 631-32 (E.D. Pa. 2005) (noting that the "judicial system is not served by making illegally

seized or inadmissible evidence available to the public"); *People v. Jackson*, 27 Cal. Rptr. 3d 596, 600 (Ct. App. 2 Dist. 2005) (noting that "[w]idespread dissemination of evidence, which may or may not be admissible at trial, can only complicate the process of selecting an unbiased jury" and, therefore, " '[a]ny disclosure in advance of admission of the evidence in a court proceeding . . . immediately threatens the integrity of the jury pool.'").

Here, the issue is not whether evidence that has been presented in court in a pretrial proceeding should be public disclosed, but whether evidence that has not been disclosed in any judicial proceeding, and for which no determination has yet been made as to its admissibility under the Tenn. Rules of Evidence, should be publicly disclosed. Clearly, if such potential evidence is publicly disclosed in advance of trial and any determination as to its admissibility by the trial judge, then the substance of the proper conditions on admissibility of evidence in criminal trials, and in particular the protections guaranteed under U.S. Const. amend. IV and Tenn. Const. art. I, § 7[3], as well as U.S. Const. amend V and Tenn. Const. art. I, § 9[4], would potentially be dissipated. More importantly, if the evidence in the

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[3] These constitutional provisions guarantee protection from unreasonable searches and seizures. The general rule is that a warrantless search or seizure is presumed unreasonable and any evidence discovered by virtue thereof is subject to suppression. *State v. Moats*, 403 S.W.3d 170, 177 (Tenn. 2013).

[4] These constitutional provisions guarantee protection against compelled self-incrimination and the United States Supreme Court had held that "the prosecution may not use statements whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant, unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The Tennessee Supreme Court has held the "the test for voluntariness for confessions under Article I [section] 9 is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment." *State v. Crump*, 834 S.W.2d 265, 268 (Tenn. 1992).

investigative and prosecutorial files in this case is publicly disclosed prior to trial, then as one court has recognized, the following scenario could occur:

> [The] stream [of news coverage] would quickly turn to a flash flood were the Sheriff to release the records of the entire investigation to the public. The public vetting of crime scene photos, witness accounts, investigatory conclusions, and other raw evidence would invite the trial of this case in the press rather than in court. This prospect poses substantial threat to the defendant's constitutional right to be tried fairly by an impartial jury.

United States v. Loughner, 807 F. Supp. 2 828, 835-36 (D. Ariz. 2011) (finding that the defendant's Sixth amendment right to a fair trial trumped disclosure under Arizona's public records law). Additionally, the Intervening Defendants would note that in the only case the Intervening Defendants have been able to discover where a Tennessee court has addressed the specific issue raised in this case, the court found that nondisclosure of records in the possession of law enforcement or prosecutor's office under the Public Records Act was justified on the grounds that disclosure would impair the right of the criminal defendant to receive a fair and impartial trial. *See Chester v. City of Knoxville*, Knox County Chancery Court No. 164305-3, Memorandum Opinion at 4 (November 8, 2006). Similarly, in the present case, the disclosure of the evidence in the Metro Police Investigative file and the District Attorney General's prosecution file, could impair the constitutional rights of the criminal defendants in *State v. Banks, et al.* to receive a fair and impartial trial. *See* Exhibit 1, Johnson Affidavit.

Finally, it should be noted that while there are various curative measures available to a trial court to cure prejudice resulting from such disclosure[5], this court is not in a position to assure that such measures can or will be taken to protect the criminal defendants' rights to a fair trial, since the decision to utilize any of these measures rests entirely with the trial court in the criminal case. Consequently, this Court is only in the position of preventing potential prejudice to the criminal defendants, rather than attempting to cure prejudice resulting from disclosure. *See Application of Kansas City Star Co.*, 143 F.R.D. 223, 228-20 (W.D. Mo. 1992). Moreover, even if this Court were in a position of guaranteeing such protective measures to the criminal defendants, the Supreme Court has recognized that such measures impose a significant cost on the judicial system and still may not be sufficient.

> Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by "impartial" jurors, and an outcome affected by extrajudicial statements would violate that fundamental right. See, *e.g., Sheppard,* 384 U.S., at 350-351, 86 S.Ct., at 1515-1516; *Turner v. Louisiana,* 379 U.S. 466, 473, 85 S.Ct. 546, 550, 13 L.Ed.2d 424 (1965) (evidence in criminal trial must come solely from witness stand in public courtroom with full evidentiary protections). Even if a fair trial can ultimately be ensured through *voir dire,* change of venue, or some other device, these measures entail serious costs to the system. Extensive *voir dire* may not be able to filter out all of the effects of pretrial publicity, and with increasingly widespread media coverage of criminal trials, a change of venue may not suffice to undo the effects . . . .

[5] These measures include a change of venue, intensive void dire, additional peremptory challenges, sequestration of the jury, and admonitory jury instructions.

Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075, 111 S. Ct. 2720, 2745, 115 L. Ed. 2d 888 (1991).

Accordingly, the Intervening Defendants submit that the public disclosure of evidence in the investigative and prosecutorial files, *i.e.*, the "third party records," before their admission at trial, could substantially impair the defendants' constitutional right to a fair trial by an impartial jury and, therefore, that Plaintiffs' complaint should be denied.

III. Tennessee appellate courts have consistently construed Tenn. R. Crim. P. 16 as establishing the clearly declared public policy of protecting records of an investigation from disclosure under the Public Records Act while the investigation is in progress and during the pendency of any prosecution arising out of the investigation.

The Tennessee Supreme Court first addressed the application of Tenn. R. Crim. P. 16 as an exception to disclosure and inspection under the Public Records Act in the case of *Memphis Publishing Company v. Holt*, 710 S.W.2d 513 (Tenn. 1986). In that case, disclosure was sought of closed investigative files of the Memphis City Police Department under the Public Records Act. The Supreme Court held that this "exception to disclosure and inspection [Rule 16] does not apply to investigative files in possession of state agents or law enforcement officers, where the files have been closed and are not relevant to any pending or contemplated criminal action, but does apply where the files are open and are relevant to pending or contemplated criminal action." *Id.* at 517. Because the investigative file sought to be examined was a closed file and not relevant to any pending or contemplated

criminal action, the Supreme Court held that Rule 16 did "not come into play in this case." *Id.*

Subsequently, in *Appman v. Worthington*, 746 S.W.2d 165 (Tenn. 1987), the Supreme Court was presented with the "issue of whether records of the investigation into the death of an inmate of a state correctional facility are available for inspection under T.C.A. § 10-7-503 of the Public Records Act." *Id* at 165. The Supreme Court noted that the "memoranda, documents and records sought to be inspected by appellees in this case are the results of the investigation by Internal Affairs of the Department of Correction into the murder" of an inmate. *Id.* at 166-67. The Supreme Court held that

> the materials sought by appellees are relevant to the prosecution of the petitions and other inmates charged with offenses arising out of the murder of Carl Estep. These prosecutions have not yet been terminated. It necessarily follows under Rule 16(a)(2) that access to materials in the possession of Sergeant Worthington are not subject to inspection by appellees, who are counsel for the indicted petitioner-inmates.

Id. at 167.

The issue of whether records in a prosecutor's file were subject to disclosure under the Public Records Act was first addressed in *McLellan v. Crockett*, 1990 WL 148 (Tenn. Crim. App. Jan. 4, 1990) *p.t.a. denied* (1990). In that case, a psychological evaluation had been performed on the criminal defendant by a private facility. The evaluation was originally placed in the court file, but at the request of defense counsel, orders were entered sealing the record and then withdrawing it from the record and giving it to defense counsel. *Id.* at *1. A newspaper reporter

requested a copy of the evaluation from the District Attorney, but was denied. The trial court found that the evaluation was a public record and ordered the District Attorney to disclose the evaluation to the reporter. *Id.*

On appeal, the Court of Criminal Appeals noted that the "sole issue is whether the trial judge erred by granting access to a copy of the psychological evaluation contained in the case file of the District Attorney General." *Id.* Relying upon the Supreme Court's decision in *Memphis Publishing Co. v. Holt* and *Appman v. Worthington*, the court held that "it is clear that the press is not entitled to access to documents in the file of the District Attorney General if there is an 'open' or 'pending' or 'contemplated' criminal action." *Id.* at *2. The Court of Criminal Appeals found that there was an "open" and "pending" criminal case and, therefore, that the trial court had erred in ordering the District Attorney General to disclose the contents of the psychological examination of the defendant. *Id.* at *2-3.

The next case in which the application of Tenn. R. Crim. P. 16 as an exception to disclosure under the Public Records Act was raised was *Freeman v. Jeffcoat*, No. 01-A-019103CV00086, 1991 WL 165802 (Tenn. Ct. App. Aug. 30, 1991). In that case, counsel for a defendant in a post-conviction proceeding made a public records request for the "police files relating to the charges of which her client was convicted." *Id.* at *1. The Court of Appeals first noted that in *Appman*, "the Supreme Court regarded Rule 16(a)(2) as statement of controlling public policy which constituted an exception to the Public Records Act, so that access was denied

under the Public Records Act." *Id.* at *5. The Court then concluded that the Public Records Act

> requires full and open disclosure of police records except those which must be regarded as protected by a clear declaration of public policy. The clearly declared public policy protects records of an investigation while the investigation is in progress and during the pendency of any prosecution arising out of the investigation.

Id. at *7.[6]

Subsequently, in *Capital Case Resource Center of Tennessee v. Woodall*, No. 01-A-019104CH00150, 1992 WL 12217 (Tenn. Ct. App. Jan. 29, 1992), access to both the files of the District Attorney General and the City of Jackson Police Department was sought. In that case, the defendant had been convicted on charges of rape and murder and had a habeas corpus proceeding pending in federal court. Access to investigative and prosecutorial files was denied on the grounds that the pendency of the habeas corpus proceeding rendered the files open within the meaning of *Appman* and, therefore, the files were exempt from disclosure under the Public Records Act. *Id.* at *1. Consistent with the earlier decisions discussed, *supra*, the Court of Appeals found that "*Holt* and *Appman* are controlling authority for the proposition that where prosecution files are open and are relevant to a pending or contemplated criminal action, Rule 16(a)(2) of the Tennessee Rules of

[6] The Court of Appeals found that the pendency of an application for post-conviction relief did not constitute an open or ongoing prosecution and ultimately ordered disclosure of the records. *Id.* That finding has since been overruled by statute and Supreme Court rule. *See Waller v. Bryan*, 17 S.W.3d 770, 777 (Tenn. Ct. App. 2000).

Criminal Procedure creates an exception to the mandate of public access under section 503(a) of the Public Records Act." *Id.* at *4.[7]

In *Van Tran v. State*, No. 02C01-9803-CR-00078, 1999 WL 177560 (Tenn. Crim. App. Apr. 1, 1999), the petitioner had made a public records request for the prosecution's file during his post-conviction proceeding. The request was denied on the grounds that the state had a pending prosecution against one of petitioner's co-defendants and, therefore, the file was not subject to disclosure under the Public Records Act. *Id.* at *5. The post-conviction court affirmed the denial of the petitioner's public records request. On appeal, the Court of Criminal Appeals stated that "[r]ecords relevant to a pending criminal action need not be disclosed under the Tennessee Public Records Act" and that since a criminal action was pending against the petitioner's co-defendant, "petitioner was not entitled to the prosecution file under the Tennessee Public Records Act." *Id.*

In *Waller v. Bryan*, 16 S.W.3d 770 (Tenn. Ct. App. 1999), the issue was once against presented to the courts of whether a petitioner could obtain through the Public Records Act copies of documents maintained in the investigative and prosecution files while his post-conviction proceeding was pending. *Id.* at 771. The Court of Appeals found that the recently enacted/adopted provisions of the Post-Conviction Procedure Act, Tenn. Code Ann. § 40-30-209(b), and Tenn. Sup. Ct. R. 28 were "state law" that provided otherwise with respect to the disclosure of these

[7] Just as in *Freeman v. Jeffcoat*, the court ultimately ordered disclosure of the records finding that the pendency of the federal habeas corpus proceeding did not render the prosecution's file relevant to a "pending or contemplated criminal action." *Id.* at *5. This finding was subsequently overruled in *Swift v. Campbell*, 159 S.W.3d 565, 575-76 (Tenn. Ct. App. 2004).

records in the investigative and prosecutorial files and, therefore, they were not subject to inspection under the Public Records Act. *Id.* at 776.

Finally, in *Chester v. City of Knoxville*, No. 164305-3, the Knoxville News Sentinel sought to obtain a copy of a videotape in the possession of the Knoxville Police Department that was relevant to a pending criminal prosecution. The trial court initially ruled that "documents in the possession of the police or District Attorney which were relevant to a current or pending criminal prosecution were not subject to disclosure under the Tennessee Open Records Law, TCA § 10-7-501, *et seq.*," relying upon the decision in *McLellan v. Crockett, supra.* Memorandum Opinion at 1-2. In denying the News Sentinel's Rule 59 motion to alter or amend, the trial court further held that nondisclosure of the records in the possession of law enforcement or prosecutor's offices was justified where such disclosure would impair the right of the criminal defendant to receive a fair and impartial trial. *Id.* at 4.

In each of these cases, access was sought to either the *entire* investigative and/or prosecutorial file or to "third party" records contained in these files (*e.g.*, private psychological evaluation of defendant) and in each of these cases, where the files or records were relevant to a pending or contemplated criminal action, denial of access to the *entire* file(s) or third-party record was upheld by the courts. Here there is no question but that Metro Police's investigative file and District Attorney General Johnson's prosecutorial file are relevant to a pending criminal action. As such, consistent with the authorities cited above, Tenn. R. Crim. P. 16 provides an

exception the Public Records Act and, therefore, these records are not subject to disclosure and inspection under that Act.[8]

IV. Even under a narrow construction of Tenn. R. Crim. P. 16, the records specifically sought by Plaintiffs are not subject to disclosure and inspection under the Public Records Act.

Even if this Court were to accept the narrow construction of Tenn. R. Crim. P. 16 urged by the Plaintiffs, *i.e.*, that any "records" gathered during the course of a criminal investigation that are made by third parties are subject to disclosure under the Public Records Act, the specific records identified by Plaintiff are still not subject to disclosure. While Plaintiffs' request seeks copies of the entire investigative and prosecutorial file, it specifically requests copies of any "text messages received or sent and videos provided and/or prepared by any third party sources." As discussed, *supra*, in Part I, any videos and photographs (regardless of who prepared or provided them) are subject to a protective order issued pursuant to Tenn. R. Crim. P. 16(d) by the trial court in *State v. Banks, et al.*, and any request to lift or modify that order should be determined by that court.

Moreover, in arguing that they are entitled to disclosure of any "text messages received or sent" by third persons, Plaintiffs have overlooked the rest of the language of Rule 16(a)(2), which provides that this rule does not "authorize discovery of statements made by state witnesses or prospective state witnesses." A

[8] It should be noted that federal courts have also construed the scope and application of Tenn. R. Crim. P. 16 consistent with these authorities. *See Crenshaw v. Steward*, USDC No. 3:09-0710, 2011 WL 3236611, at *14 (M.D. Tenn. July 28, 2011) (noting that "Rule 16 of the Tennessee Rules of Criminal Procedure excludes records in pending criminal proceedings from § 10-7-503 until the proceeding is closed and that public access to such records becomes available only after all criminal proceedings, including actions for post-conviction relief and habeas corpus, are final).

text message is nothing more than an electronic written message transmitted by cell phone or pager. The United States Supreme Court has recognized that "text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. *City of Ontario, Cal. v. Quon*, 560 U.S. 746, 760 (2010). Furthermore, statistical data on the prevalence of electronic communications clearly demonstrates that sending and receiving of text messages has become the predominant form of communication. *See State v. Hinton*, 280 P.2d 476, 490 (Wash. Ct. App. 2012).

Thus, given the nature of text messages as a form of self-expression and communication, a number of courts have found that text messages constitute "statements" of witnesses that may or may not be admissible at trial. *See, e.g., State v. Damper*, 225 P.3d 1148 (Ariz. Ct. App. 2010) (finding that text message from victim was hearsay but admissible under present-sense impression); *State v. Franklin*, 121 P.3d. 447 (Kan. 2005) (finding text message from defendant was admissible hearsay); *People v. Whitney*, No 294760, 2011 WL 222232, at *1 (Mich. Ct. App. Jan. 25, 2011) (finding that text messages are statements constituting a party admission); *U.S. v. Hunter*, 266 Fed. Appx. 619 (9th Cir. 2008) (finding that text messages were admissible under hearsay exception involving statements of party opponent or coconspirators).

Here, any text messages contained in the investigative and prosecution files constitute statements of state witnesses or perspective state witnesses relating to

the events currently under investigation and prosecution. As such, these text messages (as well as any other "statements" of state witnesses or perspective state witnesses regardless of who prepared or provided the statements) are clearly covered under Rule 16(a)(2) and not subject to disclosure under the Public Records Act. *See, e.g., Schneider v. City of Jackson*, Madison County Chancery Court No. 62846, Memorandum Opinion (February 28, 2005) (finding that 911 tapes contain statements of state witnesses or perspective state witnesses relating to the events currently under investigation and not subject to disclosure under Public Records Act pursuant to Rule 16) (copy attached).[9]

V. Disclosure of the records in question could violate the victim's constitutional rights under Tenn. Const. Art. I, § 35.

The State of Tennessee has a strong interest in protecting the rights of victims of crimes, as evidenced by the fact that in 1998, the voters of Tennessee overwhelmingly voted to amend the Tennessee Constitution to ensure that the rights of victims are guaranteed under the Tennessee Constitution. See Tenn. Const. Art. I, § 35. This constitutional provision guarantees certain "basic rights" to victims of crime, including the "right to be heard, when relevant, at all critical stages of the criminal justice process as defined by the General Assembly," the "right to a speedy trial or disposition and a prompt and final conclusion to the case after the conviction or sentence," and, most importantly for purposes of this case, "the right to be free from intimidation, harassment and abuse throughout the

[9] While other aspects of the trial court's ruling were appealed and ultimately upheld on appeal by the Supreme Court, *see Schneider v. City of Jackson*, 226 S.W.3d 332 (Tenn. 2007), this ruling that the 911 tapes were protected from disclosure was not appealed.

criminal justice system." This constitutional provision further authorizes the General Assembly to enact substantive and procedural laws to define, implement, preserve and protect these rights.

Pursuant to that authority, the General Assembly has enacted the "Victims' Bill of Rights," codified at Tenn. Code Ann. §§ 40-38-101 – 117. Tenn. Code Ann. § 40-38-102 provides that all victims of crime "have the right to be treated with dignity and compassion." Furthermore, recognizing the significant impact that crimes against a person can have on a victim, the General Assembly has declared that "cases involving crimes against the person are given judicial and prosecutorial priority over cases involving property crimes." Tenn. Code Ann. § 40-38-115(b).

Here, the pending criminal case clearly involves crimes against the person in that the criminal defendants have each been charged five counts of aggravated rape and two counts of aggravated sexual battery. The United States Supreme Court has recognized that crime of rape

> is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim . . . Short of homicide, it is the 'ultimate violation of self.' . . . Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage. Because it undermines the community's sense of security, there is public injury as well.

Coker v. Georgia, 433 U.S. 584, 597 (1977). The public disclosure of the evidence contained in the investigative and prosecutorial files in this case, particularly videos and photographs and text messages, could clearly violate the victim's

constitutional rights under Art. I, § 35, and the State's interest in ensuring that the rights guaranteed under this constitutional provision are upheld.

CONCLUSION

For these reasons, the Intervening Defendants respectfully request that this Court dismiss Plaintiffs' Complaint in its entirety and with prejudice.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response has been sent by electronic transmission and/or first class U.S. Mail, postage prepaid, to:

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